Petition

81-1558

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IN THE

Supreme Court of the United States

February Term, 1982

No._____

~~THOMAS M. HOFFERT, INDIVIDUALLY AND AS NEXT FRIEND OF JOHN THOMAS HOFFERT, A DEFENDANT MINOR,~~

~~*Plaintiff,*~~

~~vs.~~

~~GENERAL MOTORS CORPORATION,~~

~~*Defendant.*~~

COCHRANE & BRESNAHAN,

Petitioners,

vs.

RUSSELL B. SMITH, GUARDIAN AD LITEM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Petitioners, Cochrane & Bresnahan, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit opinion denies petitioners equal protection under the 14th Amendment of the United States Constitution by abrogating a contract without finding the contract invalid pursuant to appropriate standards. Further, by upholding the District Court's application of Lindy Type standards to a contingent fee contract this opinion creates a clear conflict between the Fifth and Third Circuit Courts.

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Plaintiff,

vs.

GENERAL MOTORS CORPORATION,

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COCHRANE & BRESNAHAN,

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The pertinent orders of the United States District Court for the Northern District of Texas, Dallas Division, are unreported and are appended at A-1 through A-14. The opinion of the Court of Appeals is reported and is appended at A-15 through A-22. Denial of Petition for Rehearing and Rehearing En Banc are appended at A-23.

JURISDICTION

The Fifth Circuit's judgment was entered on September 14, 1981; Petitioners for Rehearing and Rehearing En Banc were denied on October 13, 1981 and the mandate was stayed on December 2, 1981 and again on January 20, 1982 pending disposition of this Petition. This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2101(c).

ISSUES PRESENTED

1. Whether contingent fee contracts in personal injury actions on behalf of minors in Federal Courts should be automatically abrogated, with the District Judge substituting therefor his own judgment of the reasonable value of the lawyer's services when such opinion creates a clear conflict between the Fifth and Third Circuit Courts.

2. Whether the lawyer's fee in a personal injury action in Federal Court should be arbitrarily reduced because formal discovery was not pursued and a settlement was negotiated, in the absence of any showing that the amount settled for was inadequate in any way.

3. Whether the District Court denied petitioners equal protection under the 14th Amendment of the United States

Constitution when it abrogated their contingent fee contract with no showing that the contract failed to meet the appropriate standard for validity.

4. Whether a Federal Court has jurisdiction to set aside a contract between a lawyer and his client, when there is no dispute between them as to its fairness or its propriety.

STATEMENT OF THE CASE

John Thomas Hoffert, then fourteen, was seriously injured on August 15, 1978, when the Vega automobile in which he was riding collided with another vehicle in El Paso, Texas; the injuries resulted in his permanent blindness in both eyes. Hoffert's parents, acting as natural guardians, entered a contract on November 2, 1978 retaining petitioners, Cochrane & Bresnahan of St. Paul, Minnesota, to represent John Hoffert and his father in any litigation arising out of the collision, and agreeing that the law firm would receive 40% of any recovery by settlement or judgment.

Cochrane & Bresnahan first filed suit in a Texas state court against General Motors Corporation, the manufacturer of the Vega, alleging that John Hoffert's injuries were the result of the faulty design of the automobile's hood. This suit was voluntarily dismissed because of difficulties in pursuing discovery over defendant's opposition. A new action on behalf of John Hoffert and his father was brought on July 30, 1980 against General Motors Corporation in the United States District Court for the Northern District of Texas. Petitioners' preparation of the case for trial, described by counsel for General Motors as "unique" and "extraordinarily thorough" (Transcript, pp. 160, 162), resulted on October 10, 1980, in the settlement of all claims for Two Million Five Hundred Thousand ($2,500,000.00) Dollars.

Judge Higginbotham appointed Russell B. Smith guardian ad litem to represent John Hoffert in the proceeding to approve and apportion the settlement. Mr. Smith, a practicing lawyer in Dallas, devoted sixty-one hours to the evaluation of the settlement, examining evidence, conducting interviews, and weighing the risks of continued suit. After this study, and having effectuated an agreement and novation with Cochrane & Bresnahan and the Hofferts to reduce their fee to 33 1/3%, Smith recommended that the Court approve the settlement.

Judge Higginbotham apportioned $41,865.00 to Colonel* Hoffert, John's father, $27,988.70 to Cochrane & Bresnahan as reimbursement for expenses, and $500,000.00 to Cochrane & Bresnahan as attorneys' fees. The residue of the $2,500,000, with accrued interest, was ordered paid into a trust for John Hoffert. In awarding $500,000.00 as attorneys' fees, instead of the contracted for $833,333.33, Judge Higginbotham set aside the contingent fee contract, holding that lawyers representing a minor are entitled only to a fee calculated by the Court as representing the reasonable value of their services. Judge Higginbotham emphasized that the lawyers had not kept time records and had not engaged in formal discovery in the Federal Courts. (Award of Counsel Fees, pp. 3, 6).

Petitioners appealed the Judge's award of fees to the United States Court of Appeals for the Fifth Circuit, which held that the District Court did not act "outside its discretionary power" when it reduced the fee to $500,000.00, and affirmed. (Opinion, p. 11248). The Court of Appeals apparently agreed that the proper fee was an amount determined by the Judge to be "reasonable attorney compensation". (Opinion, p. 11248). A Petition for Rehearing was denied.

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* Lt. Col. Thomas M. Hoffert, U. S. Army, Father of John Thomas Hoffert.

REASONS FOR GRANTING THE WRIT

I. Whether Contingent Fee Contracts In Personal Injury Actions On Behalf Of Minors In Federal Courts Should Be Automatically Abrogated, With The District Judge Substituting Therefor His Own Judgment Of The Reasonable Value Of The Lawyer's Services When Such Opinion Creates A Clear Conflict Between The Fifth And Third Circuit Courts.

The District Court in this case, with no finding of fraud, overreaching, or undue influence, set aside a contract for fees agreed upon by John Hoffert's lawyers, his father, and his guardian ad litem, and substituted for it a figure based upon the Judge's view of the reasonable value of the lawyers' services. The Judge approached the matter as though the question was the award of a fee in a class action where no fee is contracted for and an award is to be made from the fund collected. He was quite frank about this: "My problem is . . . that I do not see a meaningful distinction between the fee setting mechanism (sic) that have been developed in the antitrust and security law fields and the personal injury field where minors are involved." (Transcript, pp. 172-173). The District Judge thus ruled in effect that no contingent fee arrangement is effective for minors in a personal injury case. We respectfully submit that there is no support for such a proposition in *Cappel v. Adams*, 434 F.2d 1278 (5th Cir. 1970), or any other case. The District Judge misused the doctrines of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1974), and 540 F.2d 102 (3d Cir. 1976), class action cases in which a

court-determined fee was mandated. This is made clear by the language of the Court of Appeals for the Third Circuit in *Dunn v. H. K. Porter Co., Inc.*, 602 F.2d 1105, 1111 (1979), when it said,

> Appellants contend that the District Court's comparison of the contractual fee to a fee to be computed under *Lindy* is not a valid benchmark for determining the reasonableness of the contingent fee. We agreed.
>
> . . . . the proposed contingent fee is not ineluctably rendered unreasonable because it is several times greater than the *Lindy* fee. Such an approach does not adequately recognize the crucial distinction between fees awarded under the *Lindy* standard and those payable under an express contract for services entered into prior to the litigation.

Surely, contingent fee contracts are subject to regulation when the client is a minor "because of the obvious possibilities of unfair advantage." *Cappel v. Adams*, 434 F.2d 1278 (5th Cir. 1970). But just as surely the contingent fee contract, which has long been recognized as necessary if injured persons are to find full judicial redress, is not to be denied all effect in the case of an injured minor. Otherwise what the District Judge clearly regards as a benefit to the injured boy here will be a detriment to other children in the future. There is no suggestion here that any unfair advantage has been taken of John Hoffert by his lawyers, and certainly not by his father. The amount of the fee agreed upon by the lawyers, Colonel Hoffert, and the guardian ad litem—33 1/3%—is a common figure for such contracts, perhaps the most common. We respectfully urge that it is not to be set aside, because the District Judge

starting from scratch would have arrived, after the fact, at a different number.[1]

The regulation of fees, as well as the award of fees, for a lawyer's services in the Federal Courts, has been recognized by Congress and this Court as ultimately a question of Federal law since 1789. See *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247-262 (1975).[2] The detailed administration of this law must be left to individual federal judges; and the prescription of schedules and guidelines by the District Courts and Courts of Appeals may be appropriate, although as noted by the Third Circuit in *Schlesinger v. Teitelbaum*, 475 F.2d 137, at 142: "The district court should give the members of its bar at some point . . . an opportunity to present their views and factual data on such guidelines." But when a wholly erroneous rule is followed, it is the responsibility of this Court to step in and set the pattern for all federal courts. See, e.g., *Alyeska Pipeline Serv. Co., supra*, and *Theard v. United States*, 354 U.S. 278 (1957) (district court corrected when erroneous standard for disbarment followed). We respectfully submit that such a wholly erroneous step was taken by Judge Higginbotham in holding that contingent fee con-

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[1] It should be noted that the amount chosen by the district judge—20%, is less than the amount permitted by Congress in suits under the Federal Tort Claims Act, 28 U.S.C. §2678. In 1966, recognizing that permitting a 20% fee would not assure claimants against the Federal Government adequate representation, Congress raised that figure to 25%. (80 STAT 306)

[2] In *Alyeska Pipeline*, at 259 n. 31, this Court noted that diversity cases present a different situation, but in context the language seems restricted to the question of the award of fees against a losing litigant, a matter more clearly substantive under the doctrine of *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938). In any event, the fact that this Court and other federal courts have maintained separate bars from the states demonstrates that the regulation of the practice of law before the federal courts is a federal question. See *Theard v. United States*, 354 U.S. 278 (1957).

tracts for minors should be set aside, and quantum meriut standards substituted.

In the last words of the hearing in this case, Judge Higginbotham said, "Unfortunately you didn't get some other Court; that's predeliction (sic), that's the way this game is played." (Transcript, p. 181). We respectfully submit that this statement sums up the error we believe was committed, and we urge this Court to act to establish some uniformity in the federal judicial system on the important question raised by this case.

II. Whether The Lawyer's Fee In A Personal Injury Action In Federal Court Should Be Arbitrarily Reduced Because Formal Discovery Was Not Pursued And A Settlement Was Negotiated, In The Absence Of Any Showing That The Amount Settled For Was Inadequate In Any Way.

The record in this case establishes that the plaintiff was well served by his lawyers. No one, least of all the district judge, has found any fault with the amount of the cash settlement of Two Million Five Hundred Thousand ($2,500,000.00) Dollars. The defendant, General Motors' lawyer testified that plaintiff's lawyers "did a unique and very thorough job for his client .... a very extraordinarily thorough and early preparation". (Transcript, pp. 160, 162). Yet the district judge, without suggesting any further steps the lawyers should have taken, emphasized the paucity of formal discovery proceedings and the fact that the case did not go to trial. It almost defies belief that these should be regarded as offsets in a case which has been thoroughly prepared and satisfactorily settled. Notwithstanding the district judge's insistence that "I don't think it's sound policy to put lawyers on these kind of cases strictly

on a clock" (Transcript, p. 173), and that "I don't want to fault anybody for preparing outside the judicial process and not tying up with discovery" (Transcript, p. 170), the lesson his decision teaches loudly is that the saving of time and the use of informal discovery, as well as the utilization of paralegals (Transcript, pp. 67, 143, 161) will result in a lower fee. This we sincerely believe is a lesson which should not be taught in the federal courts.

III. Whether The District Court Denied Petitioners Equal Protection Under The 14th Amendment Of The United States Constitution When It Abrogated Their Contingent Fee Contract With No Showing That The Contract Failed To Meet The Appropriate Standard For Validity.

The District Court denied Petitioners equal protection under the 14th Amendment of the United States Constitution when it abrogated their contingent fee contract with no showing that the contract failed to meet the appropriate standard for validity. Petitioners have recognized that under the appropriate circumstances the Court has both the authority and duty to inquire into the validity of an attorneys fee contract and, if the contract fails to meet the appropriate standard, modify the amount of fees collectable thereunder. In the present case, there has been no showing that the fee contract in question failed to meet any standard. The Court confused an inquiry into potentially excessive fees under the Canons by improperly applying *Lindy* type standards and viewing the contractual agreement retrospectively. In *Dunn v. H. K. Porter Company, Inc.*, the Court reasoned that "Courts should be loath to intrude into a contractual relationship between an attorney and client" (602 F.2d 1112), which is certainly the appropriate attitude considering that such contracts are entitled

to Constitutional protection,[3] subject to the Court's supervision over the conduct of counsel.

The attorneys fee is a bill for professional services rendered. The fee agreement is a contract for those professional services and the fact that the fee to be collected is contingent upon a successful result does not diminish the protection provided for contracts in general and, in fact, the willingness to take an all-or-nothing arrangement might justify additional safeguards in order to insure the availability to competent legal counsel who would accept meritorious but risky cases. This issue requires a hearing to correct the denial of equal protection through the abrogation of a contract *sui sponte* without a careful analysis of the facts or a showing of invalidity.

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[3] Cf. *Adkins v. Children's Hospital,* 261 U.S. 525, 545 (236 U.S. 1), (Page 14), 'Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged from money or other forms of property. If this right be struck down or arbitrarily interfered with, there is substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poorest to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money. An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state.'

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule, and restraint the exception; and the exercise of the legislative authority to abridge it can be justified only by the existence of exceptional circumstances. . .' "

IV. Whether A Federal Court Has Jurisdiction To Set Aside A Contract Between A Lawyer And His Client, When There Is No Dispute Between Them As To Its Fairness Or Its Propriety.

This Court should grant, review and reverse the action of the courts below because no "case or controversy" was truly presented to them. In *Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129 (5th Cir. 1979), a case similar to this, the Court of Appeals properly ruled that "although the District Court's attempt to protect what it considered to be the best interests of the minor is laudable, it has no authority to force upon the parties a remedy that they did not seek." The Court of Appeals in this case distinguished *Brown* on the ground that the guardian in that case had been named by a state court and all that remained for the federal court was the ministerial duty to transfer the judgment to the state court. In this case, however, the District Court had been asked by Petitioners to approve the settlement. Had the District Judge at that time undertaken an evidentiary hearing to determine the adequacy of the settlement and its provisions its actions might have been proper. But the judge instead appointed a guardian ad litem to represent the interests of John Hoffert. That guardian conducted an extensive study and concluded that the settlement agreement, with the modified fee agreement, should be approved. At this point the District Court was presented with a case in which all parties, plaintiff, his father, defendant, and the lawyers were fully represented, and in which there was no dispute, no case or controversy. In the absence of a finding by the District Judge that the guardian ad litem did not adequately represent the interests of John Hoffert, we respectfully submit that the case is one in which there is no "actual antago-

nistic assertion of rights by one individual against another." *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339 (1892). The substitution by Judge Higginbotham of his own conclusions for that of the guardian who had studied the case for 61 hours seems questionable as a matter of discretion, but more importantly, it was the resolution by the court of a nondispute.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, and the decision of the Court below reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court has caused to be served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendices thereto upon Russell B. Smith, Esq., John Thomas Hoffert and Thomas M. Hoffert.

Respectfully submitted,

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Dated: February —, 1982.

Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-80-0979-G

THOMAS M. HOFFERT, Individually and as
Next Friend of JOHN THOMAS HOFFERT, a Minor

vs.

GENERAL MOTORS CORPORATION

JUDGMENT

On the 7th day of November, 1980, came on to be heard the above styled and numbered cause, when appeared the plaintiff, THOMAS M. HOFFERT, Individually and as Next Friend of JOHN THOMAS HOFFERT, a Minor, by and through his attorney, and all parties having waived a jury, it was announced to the Court that an agreement for settlement of all matters in controversy had been entered into, subject to the approval of the Court; and

It appearing to the Court that an agreement for settlement had been reached between the parties subject to the approval of the court, the terms of said agreement providing for payment by the defendant herein to the plaintiffs herein of the sum of Two Million Five Hundred Thousand and no/100 ($2,500,000.00) Dollars plus accrued interest thereon, since deposit of such funds in the First National Bank in Dallas, and all costs of suit, in full and final settlement of all claims, demands and causes of action, whether known or unknown,

which have arisen, or may arise, as a result of the accident in question; and further providing that the plaintiff, joined by the undersigned attorney for same, has agreed to indemnify and hold harmless the minor child and General Motors Corporation from any medical expenses or medical or hospital liens for medical or hospital bills, rehabilitation, or training, past, present or future, incurred as a result of the accident in question and any rights to subrogation that may exist on the part of any insurance carrier for Thomas M. Hoffert.

It appearing to the Court that there is a conflict of interest between the adult plaintiff on the one hand, and the interests of the minor plaintiff, for whom the adult plaintiff also brings suit as Next Friend, as to the issue of apportionment of the recovery herein;

It is, therefore, ORDERED, ADJUDGED AND DECREED that RUSSELL B. SMITH, a duly qualified person, be, and he is hereby, appointed Guardian Ad Litem to represent the interests of said minor plaintiff and that he be awarded the sum of TEN THOUSAND FORTY-SEVEN AND 35/100 ($10,047.35) DOLLARS, which amount is to be taxed as costs and from which amount the statement of Professor Neil Churchill is to be paid; and

Said Guardian Ad Litem having asked for and received reasonable time to acquaint himself with the facts and the law herein, and after study and deliberation, reported to the Court that, in his opinion, the tentative agreement of settlement presented to the Court was fair, just and reasonable, and that the apportionment hereinafter ordered by the Court was fair, just, and reasonable, and for the best interest of the minor plaintiff and should be approved.

And the Court having heard the pleadings in this case and having heard full testimony, finds that there is a question as

to the liability in this case, and there is an issue also as to the extent of damages, to which the plaintiffs are entitled, if any, and the Court further finds from the evidence that such agreement of settlement is a compromise settlement agreement and is not an admission of liability on the part of the defendant herein, and further the Court is of the opinion that the agreement of settlement of the parties is just, fair, and equitable and should be approved, and said agreement is hereby approved; and

It is thereby ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs do have and recover of and from the defendant the sum of TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 ($2,500,000.00) DOLLARS, plus accrued interest thereon. The Court has been advised that GENERAL MOTORS CORPORATION, pursuant to an escrow agreement entered into between the parties and filed herein on October 10, 1980, deposited the sum of TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 ($2,500,000.00) DOLLARS in the First National Bank In Dallas, Dallas, Texas, on October 14, 1980, such sum having been paid by GENERAL MOTORS CORPORATION in full satisfaction of the agreement for settlement,

It is therefore, ORDERED that said sum, with accrued interest thereon, shall be paid by the First National Bank In Dallas, Dallas, Texas, as follows:

(1) First National Bank In Dallas shall pay to Thomas M. Hoffert the sum of $41,865.00, as reimbursement for extraordinary expenses incurred, from which Thomas M. Hoffert is ORDERED to pay to the United States Government (or its appropriate agency) the sum of $16,865.00 for medical services rendered to John Thomas Hoffert;

(2) First National Bank In Dallas shall pay to Cochrane & Bresnahan, attorneys for plaintiffs, the sum of $27,988.70 for reimbursement of expenses incurred in connection with this matter;

(3) First National Bank In Dallas shall pay to Cochrane & Bresnahan, attorneys for plaintiffs, the sum of $500,000.00 as attorneys fees; and

(4) First National Bank In Dallas shall pay the entire remainder of the escrow account, including all interest accrued thereon, to the Trustees of a Trust for the benefit of John Thomas Hoffert, said Trust to be of the type of trust approved by the Court at the hearing hereof.

The Court finds that the apportionment between the plaintiffs herein, as set forth above, is fair and reasonable.

The Court finds that plaintiffs may have a claim against the insurance carrier for Thomas M. Hoffert as a result of the accident in this case. It is therefore, ORDERED that any monies received by Thomas M. Hoffert resulting from the insurance claim plaintiffs may have against the insurance carrier for Thomas M. Hoffert be paid into the trust for the benefit of John Thomas Hoffert heretofore created by this Judgment. Any subrogation claims which said insurance carrier may have against General Motors, John Thomas Hoffert or the settlement fund are indemnified by Thomas M. Hoffert and his attorneys, Cochrane & Bresnahan, in accordance with the agreement between plaintiffs and defendant.

It is further ORDERED, ADJUDGED AND DECREED that all costs of suit are hereby taxed against the defendant.

And it appearing to the Court that upon rendition of the foregoing judgment, the defendant fully paid and discharged same in its entirety, in the manner prescribed in this Judgment by depositing $2,500,000.00 in the First National Bank

In Dallas, Dallas, Texas, as set forth above, it is ORDERED, ADJUDGED AND DECREED by the Court that no execution issue on this Judgment, and that defendant be declared fully discharged from any liability under the provisions of this Judgment, and fully discharged from any liability based upon any claims, demands, or causes of action growing out of the accident made the basis of this suit.

SIGNED this 21st day of November, 1980.

PATRICK E. HIGGINBOTHAM
United States District Judge

WE AGREE TO THE ENTRY OF
THE FOREGOING JUDGMENT:

THOMAS M. HOFFERT
Individually and as Next Friend for
the Minor Plaintiff, John Thomas Hoffert

RUSSELL B. SMITH
Guardian Ad Litem of the Minor
Plaintiff, John Thomas Hoffert

Attorney For Plaintiffs

Attorney for Defendant

(Caption)

AWARD OF COUNSEL FEES

On the afternoon of August 15, 1978, 14 year old Thomas Hoffert was involved in an intersectional collision in El Paso, Texas. Riding in the passenger side of a General Motors manufactured Vega automobile, the Vega's hood struck Thomas on impact with a 1962 Buick Special. This suit claimed that Thomas was struck because the Vega hood sprang loose and

penetrated the windshield and passenger compartments. His injuries were detailed in the Amended Complaint as follows:

(a) His facial bones were crushed to a state of near powder;

(b) One of his eyes was ripped out of his head; the optic nerve in the other eye was severed; he is permanently blind;

(c) He has permanently lost his sense of taste and smell resulting from the destruction of his face and olfactory organs and nerves;

(d) His head was lacerated to the brain, causing permanent brain damage including memory loss;

(e) He sustained multiple lacerations, contusions and bruises to his head and body;

(f) He suffered chest and internal injuries;

(g) He fractured bones in the leg;

(h) All of the above contributed to pain, suffering, mental anguish and psychological and mental distress and impairment of John Thomas Hoffert.

(i) He suffered permanent scarring to his face, head, neck, arms, legs and other parts of his body as a result of the said hood penetration.

Thomas' father, a Lieutenant Colonel in the United States Air Force, in the fall of 1978 employed a law firm in St. Paul, Minnesota, to represent his and Thomas' interests. The law firm promptly began the investigation of the accident. Its first investigative step was to send a third year law student to the El Paso area to conduct a preliminary investigation. The third year law student concluded from his investigation that a possible claim against General Motors asserting product liability by reason of the hood's penetration of the passenger compartment was available. (The driver of the Buick was uninsured).

Approximately 30 days later, the senior partner of the firm and the law student flew to New York for a one day conference with an accident reconstruction expert. The law firm over the next several months gathered information concerning the Vega automobile, discussed possible places to file suit, consulted with other experts and, in general, set about to prepare the case for trial.[1] Plaintiffs' counsel traveled to New York on two additional occasions and made several trips to Texas including Dallas. In addition, the same two lawyers traveled to Los Angeles to review testimony in a case recently tried against General Motors that also involved the Vega hood mechanism.

After consulting with a Dallas attorney, associated as local counsel, a decision was made to institute suit in the State District Court of Dallas County, Texas.[2] The State Court suit was thereafter dismissed by plaintiffs and this suit filed.

No discovery was taken in the suit. Specifically, no depositions were taken and no interrogatories were served. The sole discovery effort was the filing of one set of requests for admissions which, as of the time of settlement, had not been answered. Soon thereafter, settlement conferences was held and eventually an agreement to settle for the sum of $2,500,000 was reached. When the proposed settlement was announced, this court appointed Russell Smith, a prominent member of the Dallas Bar with substantial experience in per-

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[1] The total cost incurred for experts and reports was only $12,606.18. Indeed, the total disbursements were in the amount of $27,988.70, and $9,667.72 of that sum was for travel.

[2] Although enjoying the reputation as one of the most conservative jurisdictions in range of jury verdict, plaintiffs' only justification for that decision was the startling proposition that no other forum was available to it for venue purposes.

sonal injury litigation, as a guardian ad litem with instructions to represent the interests of the minor.

At the direction of the court, Mr. Smith employed an economist for the purpose of evaluating the best means of taking payment of the $2,500,000. Specifically, he was to determine whether a cash payment or a payment in the form of an annuity would be preferable.[3] Smith also traveled to St. Paul and conferred with plaintiffs' counsel. After advising plaintiffs' counsel of his objection to a proposed fee application in excess of one million dollars (40%), the fee application was reduced from 40% to 33-1/3%. In addition, other expenses charged to the file were dropped because they could not be verified as properly chargeable to the case.

In sum, the issue before the court is solely that of what portion of the $2,500,000 settlement should be paid to plaintiffs' counsel as counsel fees. The plaintiffs' lawyers seek recovery of $833,333.00 (33-1/3%) together with reimbursements of expenses, relying heavily upon the "benefit conferred and the fee agreement with the parent."

The first question is the standard that ought to be applied in the evaluation of their fee application. The initial position of plaintiffs' counsel at the hearing on settlement approval was that their contract with the parent was binding on the child. By the conclusion of the hearing, plaintiffs' counsel apparently had abandoned that contention and recognized that this court had the responsibility to set the fee.[4] Surprisingly,

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[3] The economist recommended taking the cash in a lump sum payment.

[4] This court has a special responsibility to supervise contingent fee contracts involving minors. *See Cappel v. Adams*, 434 F.2d 1278 (5th Cir. 1970). As was noted in *Cappel*, "[c]ontingent fee contracts have been especially subject to restriction when the client is a minor, largely because of the obvious possibilities of unfair

this court has found little direct guidance from the case law as to the amount of fee to be set in civil cases. This circuit has set out the guidelines for the award of counsel fees in civil rights, securities and related litigation in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and as further explicated in Judge Wisdom's opinion in *Cockrell Liquor, Inc. v. Adolph Coors Company*, 624 F.2d 575 (1980). This court sees no reason why the same factors ought not be employed here. The fiduciary relationship between the Court

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advantage." *Id.* at 1280. In determining the proper counsel fees, this court follows the instruction of *Cappel* to award a sum that is "reasonable and fair to the minors." *Id.* at 1281; *Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455 (C.D. Cal. 1978).

The fact that the guardian ad litem acquiesced to the 33-1/3% contingent fee does not preclude this court from reviewing the reasonableness of the fee. Fed. R. Civ. P. 17(c) requires this court to protect the interests of infants by the appointment of a guardian ad litem *or any other order it deems proper*. As was observed in *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978), "from the time of the early courts of chancery a guardian ad litem has been unable to bind a minor litigant to a settlement agreement absent an independent investigation by the court and a concurring decision that the compromise fairly promotes the interests of the minor, who, as we repeat, is a ward of the court." (citations omitted).

This court also concludes that this case raises no jurisdictional impairment such as that at issue in *Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129 (5th Cir. 1979). There, the guardian's powers flowed not from the District Court but from a Mississippi Chancery Court. The District Court had no authority to review the guardian's decisions because the supervisory responsibility over the interests of the minor had been vested in the Mississippi Court and not in the District Court. There having been no inherent authority to protect the interests of the minor (such authority have been vested by statute in the Mississippi Court), the District Court lacked the jurisdiction to review the counsel fees. Here, however, the guardian ad litem's power flows directly from the authority of this court, and this court, in turn, must ensure that there is no unfair advantage of a minor who, for purposes of this litigation, is a ward of the court. *See Cappel v. Adams, supra*; *Dacanay v. Mendoza, supra*; Fed. R. Civ. P. 17(c).

and the minor in the settlement posture is not dissimilar from that presented by the settlement of a class action. Indeed, counsel to plaintiff conceded as much in his testimony. In *Johnson*, the court enumerated the twelve factors bearing on the question of reasonable attorney's fees. They are:

(1) The time and labor required;

(2) The novelty and difficulty of the questions;

(3) The skill requisite to perform the legal service properly;

(4) The preclusion of other employment by the attorney due to acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

(7) Time limitations imposed by the client or the circumstances;

(8) The amount involved and the results obtained;

(9) The experience, reputation, and ability of the attorneys;

(10) The "undesirability" of the case;

(11) The nature and length of the professional relationship with the client; and

(12) Awards in similar cases.

Judge Wisdom noted that while all the twelve *Johnson* factors must be considered, recent decisions had directed that special attention be paid to numbers (1), the time and labor required; (5), the customary fee; (8), the amount involved and the results obtained; and (9), the experience, reputation, and ability of the attorneys.

The Court of Appeals has been sensitive that its *seriatim* formulation of factors to be considered by a trial court in the exercise of discretion invites a trial court to engage more in litanies than analyses; but it has not provided an alternative

analytical construct. I read Judge Wisdom's opinion to say ultimately no more than by keeping in mind the twelve potential factors of *Johnson*, you tell us how you arrived at the fee awarded.

This court does not have the benefit of time records or other direct information with regard to the time and labor required. The sole basis for estimating the time and energy devoted is that implicit in the travel schedules presented in the form of reimbursement and the very general testimony of the lawyers. This is true despite the fact that plaintiffs' counsel claim substantial experience in the representation of antitrust plaintiffs, where counsel admit to keeping time records. A young associate did "guess" that he had a "thousand hours" in the case. Such guesses, which this court cannot credit, are compelling support for requiring time records. The failure to keep any time records leaves this court to give its best "estimate" of the time spent on the case. In that effort of estimation, this court notes that the time and energy required in this case is substantially less than that in most antitrust and securities litigation. It consisted of normal interviews, identification of witnesses and consultation with experts. It did not involve many of the time consuming problems presented by discovery in most substantial litigation.

Plaintiffs' counsel suggest that the questions presented were novel and difficult. Of course, the prosecution of most products cases against major manufacturers is seldom simple. Yet, the court finds little unique or novel about this lawsuit. From the outset it was known that there was little chance of recovery from the actual participants in the collision. The only serious potential defendant was that of the manufacturer. Given the high number of products cases now in the federal courts, par-

ticularly in this court, identification and prosecution of such claims can hardly be described as unique.

I turn now to the specific *Johnson* factors, pausing first at "the skill requisite to perform the legal services properly." I find that plaintiffs' counsel were successful in negotiation. But I do not find that these lawyers possess the highest level of trial skill. Nothing in their presentation or in the development of the case suggests such. Instead, they appear to be the skills of the ordinary practitioners of the litigation art. Indeed, the evidence is that plaintiffs' "lead" counsel had tried only one case to verdict in the past five years. In fact, he had tried a total of one products liability case. While in today's commercial world those statistics are not startling, they are not fully consistent with a claim of high competence and experience in the trial of cases. In sum, the court finds that the skill level of the lawyers to be that of the ordinary practitioner. As for the other *Johnson* factors, the acceptance of the case did not preclude the attorneys from taking other employment; there was evidence that contingent fee arrangements in the range of 33-1/3 to 40% are customary, but there was no evidence that the percentage ordinarily is not adjusted downward when, as here, a case is settled early in its history, (and particularly where the settlement amounts are as high as here);[5] there were no unusual time limitations imposed by the client or the circumstances of this case; the case had no undesirable features; and there was no difficulty with the nature and length of the professional relationship with the client.

The amount of the settlement is substantial. One's immediate reaction is that it is difficult to quarrel with a $2,500,000 settlement. But there is an important caveat. It must be recog-

[5] This court knows from its own experience that such a downward adjustment is often the case under such circumstances.

nized that the value of this case turned directly upon two factors independent of legal skill and effort, and that the contribution of these particular lawyers played at best a secondary role. The first and most obvious factor is the horrendous injury suffered by this 14 year old boy. The second is an observation which is little more than common sense. This suit struck a nerve with General Motors. For at least the past 5 years, numerous cases against car manufacturers, and General Motors specifically, have been tried in this court. General Motors is well represented, spends considerable sums in defense of its claims, and is difficult to bring to the bargaining table. But here, the claim was settled promptly upon institution of discovery. Plaintiffs' counsel asserts that this was because the defendants were aware that plaintiffs were ready for trial. While this is plausible, the reality is that General Motors does not pay $2,500,000 in a design claim against one of its automobiles absent substantial concern for its design. Thus the benefit cannot be viewed as having been heavily influenced by plaintiffs' ingenuity and effort.

Awards in similar cases present little guidance. There was little evidence offered at the hearing with regard to counsel fee awards in similar cases and the court is left to draw on its general experience. There is no magical line separating the reasonable from the unreasonable fee. Under the facts and circumstances of this case, the court is left with the firm conviction that any attorney's fees in excess of 20% of the amount of recovery would be most unfair. A fee of $500,000 is very substantial. From the most generous estimates of time expended, $500,000 still represents a substantial multiple in a *Lindy-Lode Star* analysis. *See Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112-18

(3rd Cir. 1976); *Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1974).

Finally, it must be emphasized that this court does not by this opinion intend to demean the professional work of these attorneys; to the contrary they have performed in a reasonable, competent manner. Instead, the court intends to place their work in a realistic perspective and to insure that they receive a reasonable fee for their reasonable services. That is accomplished by this Order.

PATRICK E. HIGGINBOTHAM
United States District Judge

Thomas M. HOFFERT, Individually and as next friend of John Thomas Hoffert, A Defendant Minor,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

COCHRANE & BRESNAHAN,

P.A., Appellants,

vs.

Russell B. SMITH, Guardian Ad Litem,

Appellee.

No. 81-1002
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A.
Sept. 14, 1981.

Law firm appealed from order entered by the United States District Court for the Northern District of Texas, Patrick E.

Higginbotham, J., reducing firm's contingent fee from one-third to one-fifth for its services in representing products liability claimants. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) district court had jurisdiction to limit amount of attorneys' fee recovery from settlement proceeds, and (2) district court did not abuse its discretion in restricting law firm's fee recovery to one fifth of total settlement proceeds where, in reaching its determination, district court considered each of factors bearing on amount of reasonable attorney compensation and factual findings were fully supported by record.

Affirmed.

1. Attorney and Client 147

Fact that no party questioned propriety of contingent fee and that injured plaintiff's guardian ad litem acquiesced in its reasonableness did not shield fee from court's scrutiny as part of overall settlement of injured minor's products liability action since, having properly appointed guardian ad litem to represent injured minor's interest in litigation, district court was thereby vested with broad authority to inquire into whole range of issues bearing upon minor's recovery in order to guarantee that settlement agreement was in accord with his interests. Fed.Rules Civ.Proc. Rule 17(c), 28 U.S.C.A.

2. Federal Courts 12

Cornerstone of constitutional limitation of federal judicial power to "cases" or "controversies" is that federal court should decide only those questions necessary for adjudication of case before it. U.S.C.A.Const. Art. 3, § 2.

3. Federal Courts 12

Where both litigants desire same result, there can be no case or controversy within meaning of Constitution. U.S.C.A.Const. Art. 3, § 2.

4. Attorney and Client 147

Where plaintiff's attorney himself invokes court's equitable power to approve a settlement agreement to distribute the proceeds, the court must scrutinize the reasonableness of the contingent attorneys' fee contract which affects net recovery to plaintiff.

5. Federal Civil Procedure 2737

District court had jurisdiction to limit amount of law firm's contingent fee recovery from settlement proceeds in favor of injured plaintiff clients.

6. Attorney and Client 147

District judge has broad equity power to supervise collection of attorneys' fees under contingent fee arrangement. ABA Code of Professional Responsibility, EC2-20; DR2-106.

7. Attorney and Client 147

A district court abuses its discretion when it allows a contingent attorney fee without carefully considering factors set forth in Code of Professional Responsibility and elaborated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (1974). ABA Code of Professional Responsibility, DR2-106 (B).

8. Attorney and Client 147

District court did not abuse its discretion when it restricted law firm's contingent fee recovery to one fifth of total settlement proceeds where, in reaching its determination, court considered each of factors bearing on amount of reasonable attorney compensation and factual findings were fully supported by record. ABA Code of Professional Responsibility, EC2-20; DR2-106, DR2-106(B).

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, RUBIN and SAM D. JOHNSON, Circuit Judges.

CHARLES CLARK, Circuit Judge.

The controversy in this case is over contingent attorneys' fees recoverable from the proceeds of a settlement and judgment in favor of Colonel Thomas M. Hoffert and his minor son, John Thomas Hoffert. Cochrane & Bresnahan, P.A., the law firm representing the plaintiffs, appeals from an order of the district court reducing the firm's fees from one-third to one-fifth for its services in representing the plaintiffs. We affirm.

On August 15, 1978, the fourteen-year-old John Hoffert was severely injured when the 1973 Vega in which he was a passenger collided with a 1962 Buick at an intersection in El Paso, Texas. The Hofferts alleged that the Vega was not crashworthy because defectively designed and manufactured and that John sustained his injuries because the impact with the Buick dislocated the hood and drove it through the windshield into his head and body. As a result of the accident, John received serious and extensive injuries to his face, head, chest, and legs. Although the record suggests he has made remarkable progress in his recovery, John Hoffert is permanently blind in both eyes.

On November 2, 1978, Colonel Thomas M. Hoffert and Jo-Anne L. Hoffert, acting as parents and natural guardians of their injured son, executed a contract employing Cochrane & Bresnahan, P.A., to represent Colonel Hoffert and John in litigation arising out of the automobile collision. The retainer agreement provided that the law firm would receive 40% of any monies recovered for the Hofferts whether by settlement or by verdict.

Cochrane and Bresnahan originally filed suit in the District Court of Dallas County, Texas, against General Motors Corporation, the manufacturer of the Vega in which John Hoffert was injured. This proceeding was nonsuited and the action was refiled on behalf of Colonel Hoffert, individually and as next friend of his injured minor son, in the United States District Court for the Northern District of Texas. About two months later, the parties agreed to settle the lawsuit and presented the settlement agreement for approval of the district court. Under that agreement, General Motors paid $2,500,000 into an interest-bearing escrow account in the First National Bank of Dallas, Texas, pending court approval of the settlement terms.

The district court found that the question of how to apportion the settlement proceeds between the father and the son created a potential conflict of interest. Accordingly, it appointed a guardian ad litem, Russell B. Smith, to protect the interests of the Hofferts' son. Smith then spent about sixty-one hours evaluating the settlement terms, examining medical records and witness statements, conducting personal interviews, and investigating the risk of continued litigation. In the course of reviewing the terms of the settlement agreement, Smith advised Cochrane & Bresnahan that the district judge was concerned about the 40% contingency fee. The firm thereby agreed to reduce its fee to 33 1/3% of the recovery in order to obtain the district court's approval of the settlement agreement. On the basis of that reduction and of his independent review of the settlement terms, Smith prepared his report to the district court recommending approval of the settlement agreement.

Following a hearing, the district court approved the settlement agreement and entered judgment for the plaintiffs. How-

ever, the court disapproved Cochrane & Bresnahan's recovery of one-third of the Hofferts' award and limited the firm's share of the recovery to $500,000. The court then awarded $41,865.00 to Colonel Hoffert as reimbursement for extraordinary expenses incurred as a result of his son's injuries. In addition to the $500,000 attorney's fees recovery, the court awarded $27,988.70 to Cochrane & Bresnahan for reimbursement of expenses incurred in connection with the lawsuit. The court then directed the First National Bank to pay the entire remainder of the escrow account, including all interest accrued, to the trustees of a trust created for the benefit of John Thomas Hoffert. Contending that it is contractually entitled to 33 1/3% of the total recovery ($833,333.00), Cochrane & Bresnahan appeals from the order of the district court distributing the settlement proceeds.

The primary thrust of Cochrane & Bresnahan's argument is that the district court lacked jurisdiction to modify the amount of attorney's fees recoverable under the contingency fee agreement because it was not presented with a "case" or "controversy" within the meaning of Article III of the United States Constitution. For this proposition, Cochrane & Bresnahan relies upon *Brown v. Watkins Motor Lines Inc.*, 596 F.2d 129 (5th Cir. 1979). In *Brown*, the minor plaintiff was injured in an automobile accident, and his parents retained a lawyer on a one-third contingent fee contract to represent him in a suit against the owner and operator of the truck which struck him. The Probate Court of Alabama, the plaintiff's home state, appointed a guardian over the plaintiff's estate. The guardian, acting through the attorney retained by the minor's parents, brought a diversity action in the district court and obtained a $500,000 jury verdict for the minor plaintiff. This award was embodied in a final judgment of the district court and was

paid into the registry of the court upon its direction. When the guardian moved the district court to disburse the registry funds to him in his capacity as the plaintiff's guardian, the district judge refused to order distribution of the proceeds until an ancillary guardianship was established in Mississippi, the forum state. After that was accomplished, the district court, over the objections of both the plaintiff's guardian and attorney, again refused to disburse the judgment proceeds to the minor's guardian and fixed the attorney's fees and expenses at $93,692.67, ordering the balance of the proceeds to be paid into the Chancery Court of Hinds County, Mississippi, where the ancillary guardianship had been set up.

Presented with these facts, we held that the absence of a live controversy before the district court deprived it of jurisdiction to apportion the jury award. We recognized that in ordinary circumstances a court has power to resolve a dispute between a judgment creditor and his attorney concerning the amount of the attorney's fee lien on the judgment. 596 F.2d at 131. However, we emphasized that the contingent fee contract had already been approved by the original guardianship court in Alabama and that neither the injured minor's parents nor his court-appointed guardian raised any objection to the amount of the fee. We therefore concluded that the district court after final judgment was without power to impose uopn the parties a remedy they did not seek.

> The judicial power conferred by the Constitution has been defined as " 'the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' " If no party before a court makes or suggests any contest, but rather all litigants desire precisely the same result, there

> can be no case or controversy within the meaning of Article III.

596 F.2d at 131-32 (citations omitted).

Cochrane & Bresnahan maintains that this case is controlled by *Brown* because neither Colonel Hoffert, as the minor's next friend, nor Smith, as guardian ad litem, ever expressed any dissatisfaction with the size of the 33 1/3% contingent fee, and it emphasizes that Smith actually recommended approval of the settlement agreement in light of that amount. Nevertheless, though the facts presented in this appeal bear some superficial similarity to those involved in *Brown*, two significant distinctions set them outside the ambit of the principle applied there.

In *Brown*, the minor plaintiff was represented by a guardian appointed by the appropriate state court. Although the district court characterized the minor as a ward of the court, authority to allocate the judgment proceeds resided either with the Mississippi Chancery Court or with the Alabama Probate Court. Thus, the district court arrogated to itself responsibility for distributing the judgment proceeds which in fact belonged to the state court that created the guardianship. By contrast, the district court in the instant case, in which no judicially controlled guardianship existed, determined that a possible conflict of interest existed between Colonel Hoffert and his son and appointed a guardian ad litem to assure that the minor's interests were adequately represented.

[1] Rule 17(c) of the Federal Rules of Civil Procedure provides, *inter alia*, "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." Fed.R.Civ.P. 17(c). Cochrane & Bresnahan correctly points

out that the court's power to appoint a guardian ad litem for a minor under Rule 17(c) is confined to those cases where the minor or incompetent is "not otherwise represented" in the action. *See, e. g., Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980). But the courts have consistently recognized that they have inherent power to appoint a guardian ad item when it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent. *See, e. g., M.S. v. Wermers*, 557 F.2d 170, 175 (8th Cir. 1977); *Horacek v. Exon*, 357 F.Supp. 71, 74 (D. Neb. 1973). *See generally* C. Wright & A. Miller, Federal Practice and Procedure § 1570 at 774-76 (1975). *Cf. Zaro v. Strauss*, 167 F.2d 218, 220 (5th Cir. 1948). Cochrane & Bresnahan does not contest the district court's appointment of Smith to serve as guardian ad litem for the Hofferts' son, and there is nothing in the record to suggest that the court abused its discretion in making the appointment. That no party questioned the propriety of the 33 1/3% contingent fee and that the injured plaintiff's guardian ad litem acquiesced in its reasonableness did not shield the fee from the court's scrutiny as a part of the overall settlement which the court had before it. Having properly appointed a guardian ad litem to represent the injured minor's interest in this litigation, the district court was thereby vested with broad authority to inquire into the whole range of issues bearing upon the plaintiff's recovery in order to guarantee that the settlement agreement was in accord with his interests. *See Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978).

More importantly, the procedural posture of this case also sets it apart from *Brown*. *Brown* involved a jury award embodied in a final judgment and paid into the registry of the court; the only task remaining for the district court to per-

form was disbursement of the judgment proceeds to the court administering the minor's guardianship. Thus, we reasoned,

> The case or controversy in the federal forum ended with payment of the judgment into the registry of the court. The unopposed petition to transfer the judgment intact to the Hinds County Chancery Court was a ministerial request which should have been granted. The court's refusal to do so, followed by a *sua sponte* invocation of its equity power in an effort to protect the minor as its ward, was the assumption of a jurisdiction it lacked.

596 F.2d at 132. Here, however, Cochrane & Bresnahan itself invoked the equitable jurisdiction of the district court by asking it to approve the terms of the settlement agreement, to decree the proper allocation of the settlement proceeds, and to order their distribution to the appropriate parties. Unlike *Brown*, it was plaintiffs' counsel, not the district court itself, that appealed to the judicial powers of equity. Judicial ratification of the parties' compromise of the lawsuit was not a purely ministerial act but a responsibility at the very core of the judicial function. Therefore, when Cochrane & Bresnahan presented the settlement agreement for the court's approval, the district judge was necessarily confronted with passing upon the propriety of the contingency fee arrangement. To determine whether the settlement was just, fair, and reasonable, the district court was required to examine, among other things, the net recovery to the plaintiffs. Apart from the total settlement amount, the 33 1/3% attorneys' fee award was the single most important factor bearing on the amount of that recovery. Accordingly, determining the reasonableness of that fee was essential to the district court's disposition of the case presented to it for decision.

[2-5] This procedural difference helps to explain the rationale of *Brown*. Article III limits the federal judicial power in terms of the power to decide certain classes of "cases" or "controversies," and the cornerstone of this constitutional limitation is that a federal court should decide only those questions necessary for adjudication of the case before it. *See, e. g., Rescue Army v. Municipal Court*, 331 U.S. 549, 568-70, 67 S.Ct. 1409, 1419-20, 91 L.Ed. 1666, 1677, 1679 (1947); *Tennessee Publishing Co. v. American National Bank*, 299 U.S. 18, 22, 57 S.Ct. 85, 87, 81 L.Ed. 13, 15 (1936). *Brown* distinguished *Cappel v. Adams*, 434 F.2d 1278 (5th Cir. 1970), because no party to the action petitioned the district court to modify the contractual fee arrangement: where both litigants desire the same result, there can be no case or controversy within the meaning of Article III. *Brown v. Watkins Motor Lines*, 596 F.2d at 131 n.1. *See Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 91 S.Ct. 1292, 28 L.Ed.2d 590 (1971). But where, as here and in *Cappel*, the plaintiff's attorney himself invokes the court's equitable power to approve a settlement agreement to distribute the proceeds, the court must scrutinize the reasonableness of the contingent attorneys' fee contract which affects the net recovery to the plaintiff. *See Cappel v. Adams*, 434 F.2d at 1280-81. Accordingly, we conclude that the district court had jurisdiction to limit the amount of Cochrane & Bresnahan's attorneys' fee recovery from the settlement proceeds in favor of the Hofferts.

[6] We also reject the argument advanced by Cochrane & Bresnahan that the district court improperly reduced the amount of its fee below that provided in the contingent fee contract. The Code of Professional Responsibility of the American Bar Association imposes stringent limitations upon the ability of lawyers to contract for contingent fees. *See* DR2-

106 and EC2-20. The drafters' explanatory footnotes indicate that these Code provisions are based largely upon Canon 13 of the old ABA Canons of Professional Ethics. Canon 13 provided,

> Contingent Fees.
>
> A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, *but should always be subject to the supervision of a court, as to its reasonableness.*

(Emphasis supplied.) *See generally Allen v. United States*, 606 F.2d 432, 435-36 (4th Cir. 1979); *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1108 (3d Cir. 1979); *Cappel v. Adams*, 434 F.2d at 1280. Moreover, the district judge has broad equity power to supervise the collection of attorneys' fees under such fee arrangements. As stated in *Cappel v. Adams*, "The sum determined to be a reasonable attorney's fee is within the discretion of the district court; before a reviewing court should disturb the holding there should be a clear showing that the trial judge abused his discretion." 434 F.2d at 1280 (citations omitted).

[7, 8] A district court abuses its discretion when it allows a fee without carefully considering the factors set forth in DR 2-106(B) of the ABA Code of Professional Responsibility and elaborated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). In the circumstances of this case, we cannot conclude that the district court acted outside its discretionary power when it restricted Cochrane & Bresnahan's fee recovery to $500,000. In reaching its determination, the district court considered each of the factors bearing on the amount of reasonable attorney compensation and made factual findings sufficiently detailed to permit appellate review. These factual findings are fully supported by the record. Accordingly, the district court properly acted within its discre-

tion to supervise the reasonableness of a contingency fee contract for legal services rendered on behalf of the injured minor.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT A

No. 81-1002

THOMAS M. HOFFERT, Individually and as next friend of JOHN THOMAS HOFFERT, A Defendant Minor,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

COCHRANE & BRESNAHAN, P.A.,

Appellants,

vs.

RUSSELL B. SMITH, Guardian Ad Litem,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion September 14, 1981, 5 Cir., 198-, —— F.2d ——).

( )

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

Before CHARLES CLARK, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(XX) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/ CHARLES CLARK
United States Circuit Judge

Clerk's Note: See Rule 41 FRAP and Local Rule 17 for Stay of The Mandate.

(Caption)

ORDER:

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(XX) The motion of appellants for a further stay of the issuance of the mandate is GRANTED to and including January 11, 1982, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of appellants for a further stay of the issuance of the mandate is DENIED.

CHARLES CLARK

Chief Judge

(Caption)

ORDER:

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(XX) The motion of appellants for a further stay of the issuance of the mandate is GRANTED to and including February 10, 1982, under the same conditions as set forth in the preceding paragraph. No further extensions will be granted.

( ) IT IS ORDERED that the motion of appellants for a further stay of the issuance of the mandate is DENIED.

/s/ CHARLES CLARK

United States Circuit Judge

Opposition

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 81-1558

In the

Supreme Court of the United States

OCTOBER TERM, 1981

COCHRANE & BRESNAHAN,

Petitioners,

v.

RUSSELL B. SMITH, Guardian ad Litem,

Respondent.

Opposing Brief in Response to Petition for Writ of Certiorari

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RUSSELL B. SMITH,
Guardian ad litem

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QUESTION PRESENTED

Should the United States Supreme Court grant certiorari to review orders of the district court, affirmed by the Court of Appeals for the Fifth Circuit, fixing the fee of petitioners at Five Hundred Thousand Dollars ($500,000.00) plus expenses to be paid to them out of a settlement made by them on behalf of John Thomas Hoffert, a minor. Petitioners claim a right to a fee of Eight Hundred and Thirty-Three Thousand, Three Hundred and Thirty-Three Dollars and Thirty-Three Cents ($833,333.33) by virtue of an agreement they made with his father, Thomas M. Hoffert, who was not the legally appointed guardian of the estate of John Thomas Hoffert.

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OPINIONS BELOW

The pertinent orders of the United States District Court for the Northern District of Texas, Dallas Division, are unreported and are appended to the Petition for Writ of Certiorari. The opinion of the Court of Appeals is reported at 656 F.2d 161 and is appended to the Petition. The denial of rehearing en banc is reported at 660 F.2d 497 and is appended to the Petition.

JURISDICTION

(i) The date of the judgment sought to be reviewed is September 14, 1981.

(ii) The date of the order denying the petition for rehearing and suggestion for rehearing en banc is October 13, 1981.

(iii) This court has jurisdiction to review the decision of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no Constitutional provisions involved in this case. Chapter VII of the Probate Code of the State of Texas deals with the appointment and powers of executors, administrators and guardians. It provides for the appointment of a guardian of the person or of the estate of both the person and estate of a ward such as a minor. TEX. REV. PROBATE CODE, §184 (Vernon's). It provides in part:

> "The guardian of the estate of a ward is entitled to the possession and management of all properties belonging to the ward, to collect all debts, rentals, or claims due such ward, to enforce all obligations in his favor, and to

bring and defend suits by or against him; but, in the management of the estate, the guardian shall be governed by the provisions of this Code. It is the duty of the guardian of the estate to take care of and manage such estate as a prudent man would manage his own property. He shall account for all rents, profits, and revenues that the estate would have produced by such prudent management." TEX. REV. PROBATE CODE §230(b)(1) (Vernon's).

With reference to the collection of claims on behalf of the estate of the minor, it is provided:

"Every personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title, provided there is a reasonable prospect of collecting such claims or of recovering such property. If he willfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate, for the use of the estate, for the amount of such claims or the value of such property as has been lost by such neglect. *Such representatives may enter into contract to convey, or may convey, a contingent interest in any property sought to be recovered, not exceeding one-third thereof for services of attorneys and incidental expenses, subject only to approval of the court in which the estate is being administered.*" TEX. REV. PROBATE CODE §233 (Vernon's) (emphasis added).

TEX. REV. PROBATE CODE §234 deals with powers of a guardian of an estate of any person to be exercised under order of court and those to be exercised without court order. In the former classification, is included as §234(a)(4) "make compromises or settlements in relation to property or claims in dispute or litigation..."

TEX. REV. CIV. STAT. ANN. Art. 1994 (Vernon's Supp. 1982) (set out in full as Appendix A to this Brief) provides in part:

> "Minors, lunatics, idiots or non compos mentis persons who have no legal guardian may sue and be represented by 'next friend' under the following rules:
>
> ...
>
> 4. If any person has any interest in such recovery, the court may hear evidence as to such interest and order such claim, or such part as is deemed just, to be paid to whoever is entitled to receive same.
>
> ..."

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STATEMENT OF THE CASE

Essentially, the statement of the case found in the Petition for Writ of Certiorari is correct. To it Respondent would add that John Thomas Hoffert, the minor plaintiff, and his father were residents of El Paso County, Texas. This suit was brought against General Motors Corporation, alleged to be a foreign corporation doing business in Texas, under §§1331 and 1332 of Title 28 U.S.C. However,

the amended complaint failed to state any federal question and the jurisdiction of the Courts below must have been based on diversity of citizenship. (Plaintiffs First Amended Complaint, Record on Appeal, Vol. I, p. 7). The undersigned Russell B. Smith was appointed as guardian ad litem for the minor plaintiff "for the purpose of making a recommendation to the Court on a proposed settlement in this action." (Record on Appeal, Vol. I, p. 25). The agreed sum of $2,500,000.00 was placed in an escrow account awaiting apportionment to the parties by the district court (Escrow Agreement and Approval, Record on Appeal, Vol. I, p. 22).

Although the attorneys for the plaintiffs, petitioners here, offered evidence of a written agreement between them and the adult plaintiff, Thomas M. Hoffert, individually and as next friend of the minor plaintiff, employing them to represent him and agreeing to pay them forty percent of any recovery, they abandoned that contract and agreed to accept a lesser fee of one-third of a total settlement together with their expenses. In a written report, the undersigned guardian ad litem advised the Court that he found this settlement to be fair, just and reasonable and in the best interest of the minor plaintiff, John Thomas Hoffert, and recommended its approval. (Report of Guardian Ad Litem, Record on Appeal, Vol. I, p. 27). Contrary to petitioner's statement of the case, this guardian neither had authority to nor did he undertake to effectuate "an agreement and novation" with petitioners with reference to the fee of thirty-three and one-third percent.

The district court entered two orders on November 21, 1980. The first, the judgment (Record on Appeal, Vol. I, p. 34) approved the settlement and apportioned to the petitioners herein $500,000.00 as attorneys' fees. The second,

entitled "Award of Counsel Fees" (Record on Appeal, Vol. I, p. 39) was the Court's analysis of the facts presented to it and of what it concluded to be a reasonable fee. Petitioners gave notice of appeal "from that portion of the final judgment and opinion entered in this cause on November 21, 1980 dealing with the amount of attorneys' fees awarded to Cochrane and Bresnahan." (Record on Appeal, Vol. I, p. 48).

Although petitioners name Russell B. Smith, guardian ad litem, as respondent in this Court, it is clear Russell B. Smith has no interest in this case or in their fee except to the extent that he has been appointed by the district court to represent the interests of the minor plaintiff, John Thomas Hoffert and it is obvious that the real party in interest in opposition to petitioners' petition for an additional $333,333.33 as fees is and should be the minor plaintiff out of whose recovery that sum will be paid if it is paid at all.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioners begin their argument for granting the writ on page 5 of the petition stating: "The District Court in this case, with no finding of fraud, overreaching or undue influence, set aside a contract for fees agreed upon by John Hoffert's lawyers, his father, and his guardian ad litem..." It is a simple truism that, under Texas law which governs, neither Thomas M. Hoffert, the father as natural guardian of a son, nor Russell B. Smith as guardian ad litem had any authority to contract for a specific fee to be paid to petitioners out of the minor's recovery. The authority of the guardian was the authority given him by the district court, i.e., to make a recommendation. The father in his capacity as the natural guardian was

entitled to be appointed guardian of the minor's estate under the Probate Code but had no absolute right to act for the minor without such appointment or to control the minor's estate. *Silber v. Southern National Life Insurance Company,* 326 S.W.2d 715 (Tex.Civ.App.-San Antonio 1959, error ref'd)[1]

Petitioners, as attorneys for Colonel Hoffert and his son could have proceeded with an application in the probate court of El Paso County, Texas to have Colonel Hoffert or some other adult person appointed guardian of the estate of the minor, but in that event the fee contract with petitioners would not only have been subject to the limitations of the Probate Code but also the ultimate settlement and amount of the fee would have been subject to the approval of the probate court.

Petitioners apparently chose not to proceed with the guardianship but instead brought suit in the name of Colonel Hoffert as next friend as is clearly authorized by TEX. REV. CIV. STAT. ANN. Art. 1994 (see Appendix A hereto) and by Rule 17 FED. R. CIV. P. Having chosen to follow that route, the fixing of the attorneys' fee is subject to the orders of the court in which the claim is filed and the settlement brought for approval. *Murray v. Templeton,* 576 S.W.2d 138 (Tex.Civ.App.-Texarkana 1978, no writ history).

Petitioners rely primarily on two decisions, *Dunn v. H. K. Porter Company,* 602 F.2d 1105 (3rd Cir. 1979) and *Brown v. Watkins Motor Lines,* 596 F.2d 129 (5th Cir. 1979). Neither decision helps them. The question in *Dunn* was the authority of a district court to set aside private

[1]Refusal of the Application for Writ of Error by the Texas Supreme Court indicates that the judgment of the Court of Civil Appeals is a correct one and the principals of law declared in the opinion of the court are correctly determined. Rule 483, TEX. R. CIV. PRO. (Vernon).

contingent fee arrangements entered into between a member of the bar and various members of a class properly certified pursuant to FED. R. CIV. P. 23(b)(3).

The United States Court of Appeals for the Third Circuit found that the district court did have authority to protect members of the class and to examine into the amount of fee assessed against their recovery. It said that the court in determining the reasonableness of a contingent fee

> "must consider a number of critical factors, including the manner into which the contract was entered, the status and sophistication of the plaintiffs, whether the source of the fee payment is a settlement fund or a tax against the defendants the size of the proposed award and whether the fee allowed is sufficient to encourage capable counsel to undertake such litigation in the future . . ." (602 F.2d at 1110).

The court went on, however, to conclude that the district court, in the case before it, lacked sufficient factual basis to make its determination and the judgment of the district court was vacated and the cause remanded for further proceedings.

Brown v. Watkins Motor Lines, Inc. is easily distinguished. There, Judge Clark stated the question presented as:

> "The power of a federal trial court on its own motion to adopt as the court's ward a minor *represented by a duly qualified guardian,* fix the compensation of the guardian's attorney, and direct his payment out of a tort judgment previously rendered by the court." (596 F.2d at 130) (emphasis added).

In *Brown,* the probate court of Alabama had appointed a guardian of Brown's estate and it was the guardian who

instituted the diversity action which resulted in a judgment in Brown's favor. The court of appeals held that, when that judgment was entered and the amount of the judgment paid into the registry of the court, the controversy in the federal forum ended and the district court thereafter had nothing before it to decide. For that reason, it lacked jurisdiction to fix the amount of the attorneys' fees when no one had asked it to do so.

Quite the contrary, in the instant case petitioners did not ask the probate court of El Paso County to appoint Colonel Hoffert as the guardian of the estate of John Thomas Hoffert and no such guardian has been appointed. Russell B. Smith, as guardian ad litem appointed by the district court for the purpose of recommending to the court whether the settlement should be approved, does not stand in the place of a guardian of the estate.

The procedure followed by the district court here was neither new nor novel to the jurisprudence of federal courts in Texas. A similar reduction in contingent fees was approved by the Court of Appeals for the Fifth Circuit in *Cappel v. Adams,* 434 F.2d 1278 (5th Cir. 1970).

SUMMARY

In summary, despite the repeated references of petitioners to "the contract" there is no contract for a contingent fee which is binding on the minor plaintiff. Therefore, no contract was "abrogated". No contractual amount was "arbitrarily reduced". No contract was abrogated without a showing that it failed to meet appropriate standards for validity.

This is simply a case in which a settlement of a substantial amount payable to a minor was submitted to the court for approval by the petitioners and the court, in apportioning the award between the minor, the minor's

father and the attorneys, felt that an award of $500,000.00 was reasonable for the work that the petitioners were able to show that they had done. No constitutional issues are raised. No issues of construction of any statutes are before the Court. There are no important questions which would justify the granting of certiorari. The only matter is whether the district court acted properly in fixing the fee at $500,000.00.

For all of the foregoing reasons, petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposing Brief in Response to Petition for Writ of Certiorari has been mailed to Mr. John J. Cound, Attorney at Law, 6 Woodduck Lane, St. Paul, Minnesota 55110 and to Mr. John A. Cochrane and Mr. Patrick W. Parmater, Cochrane and Bresnahan, 360 Wabasha Street, Suite 500, St. Paul, Minnesota 55102 on this the _____ day of April, 1982.

DAVID M. KENDALL

Appendix

APPENDIX A

Art. 1994. [2167-71] *Suit and representation by next friend*

Minors, lunatics, idiots or non compos mentis persons who have no legal guardian may sue and be represented by "next friend" under the following rules:

1. In such cases when a judgment is recovered for money or other personal property, the court may by order entered of record, authorize such next friend or other person to take charge of such money or other property for the use and benefit of the plaintiff when he has executed a proper bond (in the sum at least double the value of the property), payable to the county judge, conditioned that he will pay said money with lawful interest thereon or deliver said property and its increase to the person entitled to receive the same when ordered by the court to do so, and that he will use such money or property for the benefit of the owner under the direction of the court. The bond shall be in a sum at least double the value of the property and money recovered with the exception that a bond which is executed by the next friend or other person taking charge of the money or property, as principal, and by a solvent surety company authorized under the law of Texas to execute such bonds, as surety, shall be in a sum equal to the value of the property and money recovered.

2. The judge of the court in which the judgment is rendered upon an application and hearing, in termtime or vacation, may provide by decree for an investment of the funds accruing under such judgment. Such decree, if made in vacation, shall be recorded in the minutes of the succeeding term of the court.

3. The person who takes such money or property shall receive such compensation as the court may allow and shall make such disposition thereof as the court may

order; and he shall return such money or property into court upon the order of the court.

4. If any person has an interest in such recovery, the court may hear evidence as to such interest, and order such claim, or such part as is deemed just, to be paid to whoever is entitled to receive the same.

5. If not otherwise invested in the manner provided in this article, any moneys recovered by the plaintiff, regardless of the amount, may be invested as follows by either the next friend or the Clerk of the Court:

(a) in savings accounts or certificates of any savings and loan association domiciled in this State provided such accounts are insured by the Federal Savings & Loan Insurance Corporation; or

(b) in interest-bearing time deposits in any bank doing business in this State provided the payment of such time deposits is insured by the Federal Deposit Insurance Corporation; and if such moneys are so invested in such manner as to prevent the withdrawal of such moneys from the financial institution in which they are invested without an order of the court no bond shall be required of the "next friend" in respect to such moneys until the same are withdrawn from such financial institution, at which time the court shall order such bond to be made as may be appropriate under the other provisions of this article, or the court may order such funds turned over directly to the person entitled thereto upon the court finding that the previous disability had ceased to exist.

6. If not otherwise invested in the manner provided in this article, the judge of the court in which the judgment is rendered upon application of the next friend or a duly appointed guardian ad litem for the minor, or either or

both of them, after hearing and upon a finding that the best interests of the minor would be served thereby, may by decree entered of record direct the clerk to deliver any funds accruing under such judgment to any trust company or state or national bank in Texas having trust powers, as trustee, to be held and invested as a trust estate for the benefit of such minor, under such terms and provisions of trust as may be provided by the court; provided, however, that any decree establishing such a trust estate shall contain the following trust provisions, in addition to such other terms, provisions, conditions, or limitations not inconsistent therewith as may be established by the court:

(a) the minor shall be the sole beneficiary of such trust;

(b) the trustee shall be authorized to disburse such amounts of the corpus, income, or both, of the trust as may be reasonably necessary in the sole discretion of the trustee to provide for the health, education, support, or maintenance of the beneficiary. Any income not so distributed by the trustee shall be added to the corpus of the trust;

(c) the trust shall provide for termination of the trust upon the death of the beneficiary or upon the beneficiary attaining a stated age, which shall not exceed 25 years of age. Upon termination, the then existing trust principal and any undistributed income shall be paid to the beneficiary or to the personal representative of the estate of a deceased beneficiary;

(d) the trust shall provide that the trustee serve without bond and that the trustee receive reasonable compensation, to be paid out of the income or corpus of the trust, or both, upon application and approval of the court. Any trust established by the court pursuant to this article may provide for distributions of a stated percentage of the

then existing trust corpus prior to termination of the trust, as the beneficiary from time to time attains a particular stated age, and may also provide that all distributions and all uses and applications of trust funds, either income or corpus, may be made directly to or expended for the benefit of the beneficiary without the intervention of any legal guardian or other legal representative, and that the trustee may pay any income or principal distribution to or for the benefit of the beneficiary directly to such beneficiary; to the legal or natural guardian or person having custody of such beneficiary; or directly for the maintenance or support of such beneficiary. Any trust established by the court pursuant to this article shall not be subject to revocation by the beneficiary or any guardian of the beneficiary's estate, but shall remain subject to amendment, modification, or revocation by the court at any time prior to termination of the trust. If any trust established hereunder is revoked by the court prior to the beneficiary attaining the age of 18, the court may enter such further or additional orders concerning the trust corpus and any undistributed income as may be authorized by this article. If any trust established hereunder is revoked by the court after the beneficiary has attained the age of 18, after payment of all proper and necessary expenses, the trust corpus and any undistributed income shall be delivered to the beneficiary. Any trust established pursuant to this article shall take precedence over any existing law or statute concerning minors or their property, and such trust shall continue in full force and effect until terminated or revoked notwithstanding the appointment of a guardian of the estate for such minor or such minor attaining his majority.

Amended by Acts 1971, 62nd Leg., p. 1381, ch. 367 §1, eff. Aug. 20, 1971; Acts 1979, 66th Leg., p. 1761, ch. 713, §33, eff. Aug. 27, 1979.